1948.

File No. O. Munic. Bom City/48

Legal DEPARTMENT

A BRANCH

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Subject:— P 15F

Refer 12/15 Opinions under the Bombay Municipal Act, 1888.

File No. O. Bom. Munic. Bom. City/48

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Madhav Raghunath.
18/5.
a/b.

19/5/41

M.L.A.'s Office.

It is no doubt true that under section 61(a) of the City of Bombay Municipal Act, 1888, it is one of the the obligatory duties of the Municipal Corporation to maintain aid and suitably accommodate schools for primary education but the section makes it clear that such duties are to be performed by *means* or measures which the Corporation is lawfully competent to take. Section 39 relates to the appointment of the Schools Committee and sub-section (7) of that section provides that the Schools Committee has to maintain primary schools in accordance with the provisions of the Act and the rules made under the Act. It is therefore neither open to the Corporation, nor to the Schools Committee accept any obligation or to accept any grant which is being made subject to any condition which is not in accordance with the Act or the rules made thereunder. Such an agreement would be treated as unlawful inasmuch as it would be of such a nature that if permitted it would defeat the provisions of law. Unless therefore the Act is amended, the Corporation will not be able to enter into any agreement which is not consistent with or warranted by the provisions of the City of Bombay Municipal Act or the rules made thereunder. The acceptance of the recommendations made in paragraph 100 of the Expert Committee's report would require an amendment of the Act.

sd/- P.M.
20/4

Superintendent of Local Self Affairs.

G.N. 11021 dt. 24.11.48

H.P.

Bombay Secretariat.
17/5.

c/5.

L. D. No. 1658.

Office of the Municipal
Commissioner,
Bombay, 1st July, 1948.

My dear Dravid,

I discussed with you & Lad this morning the provision of Section 3(1) of the Bombay Municipal Servants Act, 1850, & said that it would help us if notices could be posted that the pay of the persons who do not resume work by a certain time on 2nd July will be withheld, and if sufficient & satisfactory cause is not shown by a particular date, say the 5th of July, it will be forfeited. The legal question is whether withholding the pay & subsequent forfeiture under this Section may/ conflicts with any other provision of law, especially the Payment of Wages Act. I shall be glad if you can have this position examined & intimate us the finding of Government on it.

I am sending a copy of this letter to Lad, Dikhle, and Gholap.

Encl: Copies of opinions given
by M/s. Crawford, Bayley & Co.
(Mun. Solicitors) re: section 3(3) (a)
of the Municipal Servants
Act of 1850.

Yours sincerely,
sd/- (B.K.Patel).

V.K. Dravid Esq. I.C.S.,
Secretary to the Government of Bombay,
Labour Department, Secretariat, BOMBAY.

Copy to P.K. Lad Esq., I.C.S., Secy to Govt. Legal Dep
& Remembrancer of Legal Affairs.

sd/- B.K.Patel.

F.T.O.

Mr. Dravid was of opinion that the Legal position was clear and it was not necessary to get R.L.A.'s advice and he has informed the Municipal Commissioner accordingly.

file.

EC(O. Municilites/48.)

sd/- P.ML.
1/7/1

Madhav Raokdam.
17/5.

31st January 1947.

S/1470.

The Municipal Commissioner
for the City of Bombay.

Sir,

The Bombay Municipal Servants Act, 1890.

Resignation of absence of municipal officers and servants engaged in certain essential dut

We have the honour to acknowledge receipt of your letter No. S 19674 of today's date with a copy of the above Act.

It is clear that the two months' notice in writing mentioned in sub-clause(a) of sec. 3 (1) of the Act refers only to the case of resignation preceded by proper notice, and not to any other kind of withdrawal or absence from duty.

The scheme of the provision contained in sec. 3 is that a municipal officer or servants is liable to certain penalties, either.

(1) if he resigns from his post without obtaining the written permission of the Commissioner and without giving at least two months' notice in writing of his proposed resignation, or

(2) if he withdraws or absents himself from duty, except in cas of illness or a ccident disqualifying him for the discharge of his duty or other reasons accepted as sufficient by the Commissioner.

In case (1) both of the two conditions are essential to make a resignatic and so avoide the penalities imposed by the section. If, for example, a municipal officer applies to the Commissioner for permission to resign on giving two months' notice and receives that permission, and then resigns or attempts to resign on giving only one month's notice, the resignation would not be a vialid one, and the municipal officer if he attempted to quit his duty at the expiry of the insufficient period of notice, ~~xxxx could in fact be the~~ ~~writing~~x

Madhav Raokadam.

17/5.

c/5.

would be liable to the penalties of the recognisal. He would in fact be in the same position as if he had quitted duty without any notice, at all.

Yeoman Headline.
2.17/5.
c/5.

Case (2) refers to that may be described as "wilful" absence from duty, wilful in the sense that the absence is not covered by one of the specified exceptions, i.e. either illness or accident disqualifying him for his duties or other reasons accepted as sufficient by the Commissioner. In this case no question of notice arises. The case assumes withdrawal or absence from duty without the pre-requisites of permission of the Commissioner and sufficient period of notice contemplated by case (1), and in such kind of withdrawal or absence the municipal officer becomes liable to the penalties at once.

In short, the only ways in which a municipal officer or servant can withdraw from his duty, in such a way as to avoid penalties of the Act, are by giving the proper two months' notice with the permission of the Commissioner, or in accidental circumstances which may physically prevent him from continuing his duty, the Commissioner being the judge of such matter except in obvious cases of illness or accident.

Under sec. 4 of the Act the Commissioner may at his discretion either (a) accept any resignation to take effect at any time later than two months from the date the resignation is tendered or (b) at any time after the resignation has been tendered dispense with the services of the officer or servant concerned. If the Commissioner exercises his discretion under either of these two heads, the resignation would be valid and the remitted penalties avoided, but the Commissioner is not bound to exercise his discretion under these heads, and if he does not, the position under sec.3 is as stated above.

No return herewith the copy of Act.

Accept.

Yours obediently,

(sd) Crawford Bayley & Co.

Railway Secretary.
17/5.
c/5.

BOMBAY MUNICIPALITY.

No. SR/19003 of 1946-1948.

Bombay, 6-2-1947.

From

The Municipal Commissioner
For the City of Bombay.

To

Messrs. Crawford, Bayley & Co.,
Municipal Solicitors.

Gentlemen,

The Bombay Municipal Servants Act of 1880 applies to the members of the Fire Brigade, Conservancy staff & Water Works establishment. It would appear from section 3(1) (a) of the above Act that no member of the staff mentioned above can go on strike.

2. But in view of the provisions in the Indian Trade Disputes Act of 1929 & the Defence of India Rule 81-A, it is a question for consideration whether the view stated in para 1 above is correct. I would appreciate your advice on this.

3. Relevant papers are in attached.

Yours faithfully,

sd/- B.K.Patel.
Municipal Commissioner.

Shiv Bookdan.
17/5.
C/5.

COPY.

14th February 1947.

The Municipal Commissioner
for the City of Derby.

Sir,

The Derby Municipal Servants Act, 1890.
The Indian Trade Disputes Act, 1929.
Defence of India Rule 81.A.

We have the honour to refer to your SE/19799. of the 6th inst.

2. Under section 3(1) (a) of the Derby Municipal Servants Act, 1890, any municipal officer, servant or other persons employed by or on behalf of the or on behalf of the Corporation to perform any of the duties specified in the Schedule to that Act, (which include, under Class I the conservancy duties therein specified, and , under Class II, the duties of members of a fire brigade and of persons, however designated, employed on or in connection with the maintenance or service of any municipal water works), who, without your written permission, resigns his office without at least two months' written notice to you, or withdraws or absents himself from his duties, except in case of illness or for other reason accepted by you as sufficient, becomes liable to the forfeiture and penalties, specified in that section.

3. Under section 15 (1) of the Trade Disputes Act, 1929, any person who being employed in a public utility service(as defined in section 2(g) of that Act) goes on strike in breach of contract without having given to his employer, within one month before so striking, not less than 14 days' previous notice in writing of his intention to go on strike, or having given such notice goes on strike before the expiry thereof, is liable to the penalties specified in the section. It should be noted that the definition in section 2(g) of this Act does not conflict with the scope of the Schedule to the Derby Municipal Servants Act, 1890, as although "public utility service" as defined in section 2(g) includes "any system of public conservancy or sanitation", (which would include the Municipal conservancy services), and "any industry, business or undertaking which supplies water to the public.", (which we think would extend to the Municipal waterworks), there is no reference in section 2(g) of fire brigade services.

4. As regards Defence of India Rule 81.A, as continued in force by Ordinance XX of 1946, the power conferred on the appropriate Government under clause (1) of that Rule is a power, in certain circumstances , to make provision by general or special order for prohibiting, inter alia, a strike. A general order has been made prohibiting, any person employed in any undertaking from going on a strike without having given to his employer within one month before striking not less than 14 days' notice of his intention to do so. A breach of that order is under Rule 81 A(4) punishable with fourteen imprisonment or with fine or both.

5. Section 15(1) of the Trade Disputes Act and Rule 81 A of the Defence of India Rules are not penalties in form or in effect, but are enactments which create offences. These enactments do not declare that a person shall be at liberty to go on strike if he gives the specified notice, but merely provide that he will be liable to certain penalties if he goes on strike without giving specified notice. We are therefore of the opinion, that neither of these enactments affects the operation of section 3(1) (a) of the Derby Municipal Servants Act, an enactment which makes it an offence for any person subject thereto to absent himself from his duties.

6. Although section 15(1) of the Trade Disputes Act and section 3(1) (a) of the Derby Municipal Servants Act operate independently of each other, it will, of course, be the duty of the Municipality to make to the Provincial Government the report mentioned in section 15(2) of the Trade Disputes Act as regards the receipt of notices from persons employed in a public utility service as defined in that Act. This does not affect the legal position as discussed above.

We return herewith the accompaniments to your letter under reply, receipt of which please acknowledge.

We have the honour to be,
Sir,

Your most obedient Servants,

Sd/- Crawford, Bayley & Co.

Madhav Rajaram Mackadam.

6/5.
17/5/56.

The Municipal Commissioner proposes to levy tax on theatres, cinema etc. by resorting to one of the following alternative methods :-

1) The tax may be levied on the basis of the total number of seats without reference to the income gotten/ actual or real produced by them.

2) The tax may be levied on the rateable value of the theatre building.

3) ~~The theatres may be classified into 3 or 4 groups~~ The tax theatres may be classified into 3 or 4 groups and different rates fixed for different groups as follows:-

Class I. First run houses — Rate

(a) English. Rs. 20 per show.
(b) Regional Languages or Hindi.

Class II. Second run houses - Both English & Regional languages. Rs/7 per show.

Class III. Houses showing old pictures & theatres in certain poor localities etc. Rs 5 to per show.

The Municipal Corporation has also suggested a fourth alternative of levying the tax by means of prescribing a licence fee graded on the basis of the number of seats provided in the theatre or the floor area.

The question for consideration is whether a tax as suggested by the Corporation can be legally levied on theatres and cinemas.

2. It is now a well settled law that in deciding whether a particular tax falls in the Central List or the Provincial List, the Courts will look to the essential character of tax or what it is in pith and substance. The taxes on luxuries including taxes on entertainments and amusements fall in the Provincial Legislative List (see entry 62) while taxes on income fall in the Federal Legislative List (vide entry 54). The question for consideration which would be whether the tax which is now proposed to be levied by the.

Mukherji Bachelors
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Municipal Commissioner, falls in pith and substance Federal Legislative List or in entry 59 of the Provincial Legislative List.

3. According to the first alternative suggested by the Municipal Commissioner the tax is to be levied on the basis of the total number of seats and according to the second alternative it is to be levied on the basis of the rateable value of the theatre building. In accordance with the third alternative suggested the cinema theatres are to be classified into groups and different rates of taxes are to be levied for different groups. In none of the alternatives an attempt is made to tax income, and if the charging section is so drafted as to make the tax a tax leviable on entertainment and amusements, the Courts will regard it in essence as the tax on entertainments and amusement and will uphold it as one falling under entry 59 of the Provincial Legislative List. A ~~very~~ similar question came up for consideration in the case of Sir Byramjee Jeejeebhoy Vs. Province of Bombay (42 Bombay Law Reporter, 10) in which the validity of the urban immovable property tax levied by the Bombay Government under Bom. Act II of 1932 was challged on the ground that the tax was a tax on income. The Full Bench in that case upheld the tax on the ground that it was the tax on land and buildings and fell within entry 49 of the Provincial Legislative List. The main ground on which it was sought to be shown in that case that the tax was tax on income was ~~that~~ that it was assessed on the same basis as income tax. i.e. on annual value or the amount at which the property might reasonably be expected to be let, but the High Court held that the mode of assessment did not determine the character of the tax according to the High Court one has to look to the essential character of the tax apart from the mere machinery by which it is assessed. In the present

adhav Keskardas.

c/5.

In the present case according to the first two alter
natives the tax is sought to be levied on the basis o
the total number of seats or on the basis of the
rateable value of the theatre building. In accordance
with the principles enunciated in the High Court deci
sion referred to above, if the tax is levied in sub-
stance on amusements and entertainments, its essential
character will be a tax on amusements and entertainm
and not on the income accruing to the persons in
occupation of the theatres. It will thus differ fro
income-tax the essential characteristic of which is
that it is a tax on income generally. The third al-
ternative suggested by the Municipal Commissioner
seems to be also free from any legal objection. In t
case also the tax is levied irrespective of the fac
whether any income has accrued from any show. In thi
view it is not necessary to consider the fourth alter
ve suggested by ~~suggested by~~ the Commissioner.

4. Under the Bombay Entertainments Duty Act, 1923,
there is already levied a tax on entertainments but it
is a duty on all persons for admission to any enterta
ment. That tax falls on the entertainer. In the pres
case the tax will fall on the entertainer. But it do
not follow from the fact that the entertainer is liabl
to pay the tax that the tax is income-tax. A similar
view was taken in the Urban Immovable Property tax cas
See the observations of Kania J. at p. 54 of the Repor
In principle also there can be no objection if the tax
is levied in two ways if it is found convenient to

to tax in one way the entertainer and in another way the entertainer. Both the taxes can coexist without any clash.

5. As the point is one of the great importance and the Advocate General has already expressed his opinion on the last occasion in this matter, it may referred to him again for opinion and he may be requested to consider the question in the light of the High Court's decision in the Urban Immovable Property tax case.

Sd/- S.L.
4/11.

Addl. Secy. Sd/- J.R.D.
4/11.

U. M. to the Adv. General, No. 10410 d. 5/11/1948.

I agree with the opinion of R.L.A.

Sd/- M.P. Amin
11th Dec. 48.

Finance Section.
3/5
c/5.

Legal Department.

A copy of the Statement of the case sent to the Advocate General, Bombay, is forwarded to the Health and Local Government Department. The Advocate General agrees with the view expressed in the Statement.

sd/- J. R. Dhanuka
20/12.

Additional Secretary to Government,
U.P. to H. & L.G.D.No. 12117, dated the 20th December 1948.

Madras Records.
17/5.
C/5.